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# AMENDING PROCEDURE OF THE FEDERAL CONSTITUTION<sup>1</sup>

JACOB TANGER

*Pennsylvania State College*

## PROPOSED AMENDMENTS SINCE 1889

The development of government on American soil presents, as one of its features, the embodiment in its fundamental law of provisions for its modification. The early colonial charters kept alive the fiction that a form of government once established was supposed by its creators to last forever.<sup>2</sup> Only the slow change of custom or the violence of a revolution could modify or destroy such a system of government, except, as in the case of the charters granted by the crown, a modification came as a consequence of the exercise of the royal prerogative.

In the Frame of Government drawn up by Penn and his colonists in 1683, appeared an amending provision for the first time in the history of written constitutions; and while all subsequent Pennsylvania charters contained a similar provision, the other colonial charters presented no method whatever for their alteration. Prior to the drafting of the Constitution of the United States, however, a method of amendment was embodied in the state constitutions of Delaware, Pennsylvania, Maryland, Georgia, Vermont, South Carolina, and also in the Articles of Confederation.

Mindful of the fact that with the lapse of time and changing conditions would arise a demand for altering their work, the framers of the Constitution of the United States made pro-

<sup>1</sup> A paper prepared for the annual meeting of the American Political Science Association, December, 1915.

<sup>2</sup> Charters of Mass. Bay and colony of New Plymouth granted by Charles I, 1629; Charter of Mass. Bay granted by William and Mary, 1691. F. N. Thorpe, *American Charters and Constitutions*, vol. III, pp. 1842, 1852, 1877.

visions in article V of our fundamental law, that congress by a two-thirds vote of both houses, or a convention called by congress upon the request of the legislatures of two-thirds the States, shall propose amendments which shall be valid as part of the Constitution, when ratified either by the legislatures of three-fourths the States, or by conventions in three-fourths the States.

The fact that over two thousand amendments to the Constitution were proposed during the first century of its history, as shown by Professor Ames, attests to some degree the wisdom and foresight of the framers in providing for the amendment of their work; but on the other hand, the fact that only fifteen of these were adopted, has hardly met the expectations of the framers themselves, and has caused students of our system of government to decry the method prescribed as so difficult as to make amendment possible only in times of great crises. Madison believed the method provided, "guarded against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate discovered faults." Hamilton trusted that time would bring the work of the framers to perfection, and that the feeling of inconvenience must correct the mistakes into which they inevitably fell in their first trials and experiences in the balancing of a large State on general laws.

The same tendency to amend the federal Constitution prevailed during the first quarter of the second century, as has been shown to have existed during the first century of its history. That many changes in the form and also in the powers of the government have been contemplated, is apparent upon an examination of the almost one thousand proposals for amendment, officially presented in congress, during the period from March 4, 1889, to March 4, 1913.

Among the changes in the form of the legislative department of the government, one providing for the abolition of the senate and thus making congress a unicameral body, although proposed only once, is of interest. Propositions for changing the time of commencement and termination of the congressional

term and of the annual meeting of congress have been of more frequent occurrence than any other affecting congress as a whole, while the granting of representatives in congress to the District of Columbia, and the adoption of the English system of permitting members to occupy cabinet positions, have on several occasions been the subject of amendments proposed.

Efforts to fix in the Constitution the number of representatives in the house have been the occasion for the proposal of several amendments. The term of representatives has been a subject of much criticism; twenty-six amendments having been proposed providing for either a three or a four year term.

Amendments providing for qualification of electors of representatives, as well as the regulation of their election by the federal government rather than by the State have been urged on several occasions; in most cases, however, in connection with the efforts to secure the direct election of senators. Two amendments proposed embraced in their provisions the recall of representatives.

The senate is the only department affected by amendments during this period. By the adoption of the seventeenth amendment, the election of its members was taken from the state legislatures and placed with the people. Aside from the proposed amendments providing for the direct election of senators, few changes in the senate were seriously considered. Four amendments providing for terms of four and eight years, and two others providing for basing the States' representation in the Senate on its population, were proposed.

The large number of amendments proposed providing for changes in the method of electing the President and Vice President, the time of the commencement and termination of the presidential term, the length of the presidential term, together with provisions fixing the number of terms and also the presidential succession, indicates a wide-spread dissatisfaction with the executive department. The senate on three occasions passed a joint resolution providing for a change in the time of inaugurating the President, and on another occasion passed one limiting the President to one term of six years. Of the powers granted

the President in the Constitution, the veto power has called forth the greatest number of proposals for alteration. That he be given the power to veto separate items in appropriation measures has been urged in over a dozen proposed amendments. On the other hand, attempts to diminish the power of his veto have been made in proposed amendments providing for the passage of vetoed measures by a majority vote in both houses. The appointing power of the President would be materially reduced by the adoption of several amendments proposed during this period, providing for the election of judges and other appointive officials in the department of justice, members of the cabinet, collectors of customs and internal revenue, and postmasters.

The judiciary has been attacked at many points. In summing up the proposed amendments affecting this department, one can not avoid the conclusion that the general purpose is to strip it of its independence of responsibility to the people. Provisions fixing the number of judges on the supreme court; for the election of judges by the people; for a term of office of from eight to twelve years; for removal by concurrent resolution of congress, or by a simplified method of impeachment, were embodied in the amendments proposed. As to the jurisdiction of the courts, the efforts to amend, although few, have provided for its limitation.

By far the greater number of amendments proposed have related to the powers of the government. Attempts to amend the financial, commercial, territorial, and war powers have been made with great frequency. Provisions for apportioning direct taxes among the several States, according to the valuation of property subject to taxation in the several States; for an income tax without apportionment according to population, as finally embodied in the sixteenth amendment; a corporation tax; removal of the prohibition of an export tax; and restrictions on private or special appropriation legislation, are the changes most frequently urged in regard to the financial powers.

The development of many trusts and monopolies beyond the control of the States during this period created a demand for their regulation by the national government. Amendments con-

ferring power on congress to regulate or suppress trusts and monopolies, as well as power to incorporate or license corporations engaged in interstate business, were proposed as a means of bringing about a solution of this recently developed problem.

Provisions restraining the government in the annexation of territory and in the admission of new States into the Union, appeared in several amendments proposed during the rise of anti-imperialism at the close of the last century.

Few amendments touching the war power were proposed. One is of interest, in that it provided for the abolition of the army and navy; others provided for limitations on the granting of pensions.

Frequently amendments relative to the relation of the government to the individual were proposed. Amendments empowering congress to regulate marriage and divorce; granting suffrage to women, repealing the fifteenth and part of the fourteenth amendments; specifying certain qualifications for citizenship; defining treason; limiting private fortunes; and providing for the punishment of certain crimes, constitute the greater number in this class.

The desire to extend police power to the national government is seen in over fifty amendments providing for the prohibition of bigamy and polygamy; the protection of labor by the establishment of uniform hours of service, and employer's liability; government insurance; prohibition of lotteries; and the suppression of the liquor traffic.

That the recognition of God should be included in the preamble to the Constitution was the object of ten amendments proposed. To guard against sectarian legislation over a dozen amendments were proposed forbidding the granting of any aid to sectarian institutions. Provision for the establishment of a national free school system followed in several cases the provision for forbidding aid to sectarian institutions.

Several efforts were made to engraft the initiative and referendum, as well as the recall, on our system of government by constitutional amendment. Even the process of amendment did not escape attack. During the latter part of this period while

the forces were gathering for the passage and adoption of the sixteenth and the seventeenth amendments, provision for a simpler method of amendment appeared in several proposed amendments.

Taken as a whole, the proposed amendments to the Constitution afford an index of real problems confronting the government and the people. While in many cases the occasion for the change proposed is trivial, on the other hand many amendments proposed record the progress of great movements begun in an earlier period. In this latter group may be placed the movements for the direct election of senators, the direct election of judges, woman suffrage, uniform marriage and divorce laws, regulation of the liquor traffic, changing the time of the commencement and termination of the congressional and presidential terms, and the length of the presidential term as well as the number of terms. Problems more peculiar to this period may be seen in the proposed amendments providing for an income tax, prohibition of bigamy and polygamy, limitation on the acquisition of non-adjacent territory, regulation of trusts, and protection of labor.

More than 700 resolutions providing for 977 amendments were introduced in congress during this period. Two of these passed both houses of congress and were ratified by three-fourths the States and became a part of the Constitution. Ten others passed one or the other branch of congress;<sup>3</sup> five providing for the direct election of senators, two changing the commencement and termination of the presidential and congressional terms, two providing for the succession to the presidency, and one limiting the President to one term of six years.

Several conditions characteristic of this period served to develop the large majorities necessary for amending the Constitution. The accumulation of large fortunes, and the formation of corporations and trusts with their constantly increasing influence in the state as well as in the national government, created a widespread feeling of hostility on the part of the great mass

<sup>3</sup> Five passed the senate and five the house.

of the people. The problems of taxation and representation so prominent in the convention in 1787, came to the front again in this later period as a result of the economic and social conditions arising from our industrial development since the Civil War. Both the state and the national legislature became battlegrounds where the people arrayed themselves against special privilege. The results of this conflict were the gradual advance of the people to power and the enactment of laws for their welfare.

The incorporation of the income tax provision in the revenue measure of 1894 was but a part of this movement. A shifting of a part of the burden of national taxation from the consumer to the income of the rich, had been demanded since 1884 by minor political parties whose strength lay with the farmers of the West and South and the laboring classes of the large cities. By 1894 this Populistic scheme fitted in well with the Democratic party's anti-protection policy in framing their revenue measure, but this "communistic march," as Mr. Choate characterized it before the supreme court, was stayed the following year by that body in declaring the income tax unconstitutional in the case of *Pollock vs. Farmers' Loan and Trust Company*.<sup>4</sup> The advocates of an income tax, however, had no thought of quitting their attack on wealth because of the court's decree, but immediately set about to remove the constitutional barrier in the way. The return of the Republican party to office in 1897, and the restoration of the protective tariff, removed the immediate need for new sources of revenue, while the public interest in the national problems connected with our war with Spain, diverted for a time the assault on special privilege. The formation of trusts and the gigantic financial power created by the accumulation of capital immediately following the war, revived the spirit of dissension on the part of the consumers not benefited by protective tariff to such an extent that its presence as a real force, demanding a tax on incomes to the end that wealth might bear its proportional share of the burden of taxa-

<sup>4</sup> 157 U. S., 429; 158 U. S., 601.

tion, made itself felt even in the Republican party. The slight concession in the Republican platform of 1904, to the effect that protection should be adjusted to the difference in the cost of production at home and abroad, the recommendation of a tax on incomes by President Roosevelt in his annual messages of December 3, 1906, and December 2, 1907, when viewed in the light of subsequent events, indicates that a portion of the Republican party, at least, had recognized the presence of a demand on the part of a considerable portion of the people for a readjustment of the burdens of taxation. The presidential campaign of 1908 presented the issue between the people on the one hand and capital and special privilege on the other, in a more definite form than it had hitherto taken in national politics, and indicated the national strength of the forces favoring an income tax. Although the Republican party did not include a plank advocating an income tax in its platform in 1908, as did several of the other parties whose combined strength at the November election proved to be only slightly below that of the Republican party,<sup>5</sup> the pledge of the party to a revision of the tariff in a special session of congress showed its apprehension of the growing demand for such a tax. The recommendation by President Taft in a special message to Congress, June 16, 1909, that an amendment to the Constitution be proposed providing for an income tax and the subsequent introduction of a resolution to that effect, from the committee on finance by Senator Aldrich of Rhode Island, on June 28, 1909, was but the surrender of the last stronghold of capital and special privilege that stood in the way of this popular movement.

The amendment providing for the election of United States senators by the direct vote of the people is a result of the same movement on the part of the people to more carefully safeguard their interests by changing the machinery of their government so as to make it function more closely in accord with the popular will, rather than to change its function to meet a certain

<sup>5</sup> In 1908 the Democratic, Socialist, Prohibition and Independence parties demanded an income tax. The total vote polled by these four parties was 7,208,127; while the Republicans polled 7,679,006 votes.

popular demand, as was the case in the sixteenth amendment. Although the movement for amending the Constitution so as to place with the people the power to elect United States senators, had its inception more than three-quarters of a century before the final adoption of the seventeenth amendment, it was not until a great reaction against representative government in favor of popular government occurred, that it was assured success. The arguments advanced in the earlier period of the movement, that the election of senators by the state legislature was undemocratic as a method and evidenced distrust of the people, and that their choice by the people would be more consistent with the genius of American government, did not appeal with sufficient force to congressmen or to the people to produce any concerted action.

The stress of conditions in the West which gave rise to the Populist movement in the early "nineties," and which failed to find relief by means of national legislation either through the free coinage of silver or an income tax, forced the newly organized party to turn to the state legislatures for relief. Immediately there began an assault on every piece of political machinery that offered resistance to the legislation they proposed, with the result that the initiative, referendum and recall were instituted as devices to strip representative government of its power to thwart the popular will. Such were the means by which the people eventually came to their own, not only in the West, but in every section of the Union where a corrupt or boss-ridden government failed to respond to popular demands.<sup>6</sup> An amendment to the Constitution providing for a still further application of this popular control of the machinery of government appealed to the people now not so much as a logical development of democracy, but with far greater force as an expedient method whereby they could more completely exercise control over their state legislature, as well as secure a more direct influence in the United States senate.

<sup>6</sup> For a brief account of this movement, see Charles A. Beard, *Contemporary American History*, pp. 283-288.

The adoption of the seventeenth amendment was the result of a force characterized by Senator Borah as absolutely resistless, a force borne on, not by a tide of popular hysteria, but "a tide of the earnest effort of the American people to make what free government is destined to be in the last analysis—popular government."<sup>7</sup>

The number of amendments proposed in each congress has gradually increased during this period from sixty-six in the 51st Congress (1889–1891) to one hundred and thirty in the 62d Congress (1911–1913), providing in the latter case for some forty changes in the Constitution. In all, over twenty-seven hundred proposals to amend the Constitution have been made during the first hundred and twenty-four years of its history.<sup>8</sup> Out of this large number of proposals only seventeen have become a part of the Constitution. Upon considering the large number of amendments proposed and the exceedingly small proportion adopted, the question immediately arises whether the conditions imposed by the convention of 1787 relative to amending the Constitution will not eventually become so onerous as to overtax the patience of the American people. The adoption of the sixteenth and seventeenth amendments has no doubt done much to dispel the long standing notion that our Constitution can be amended only in times of great crises, but the popular demand that secured the adoption of these two amendments was not satisfied with this achievement or with the hope of securing the adoption of others of a similar character.<sup>9</sup> The method of amendment as provided in article V of the Constitution loomed

<sup>7</sup> 61st Cong. 3d Sess., Jan. 19, 1911. *Record*, p. 1107.

<sup>8</sup> 1736 were proposed during the first century of the Constitution, see Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of its History*; 977 proposed during this period, 1889–1913. These numbers are taken from the calendars of amendments proposed during these two periods. Professor Ames' contains many amendments inserted after the 1736 were compiled, which when added to the latter number makes the total number in his calendar 2023. It would thus be more accurate to place the number of amendments proposed during the period from 1789 to 1913, at 3000.

<sup>9</sup> For example, proposed amendments providing for direct election of President and Vice President, election of judges, election of postmasters, recall of representatives, initiative, referendum, woman suffrage, protection of labor.

up before the advocates of popular government as an ever present obstacle in their way, and it was against this stronghold of the opposition that they eventually directed their attack. Evidence of this phase of the movement made its appearance late in this period, during the 61st and 62d Congresses (1909–1913) when six amendments were proposed providing for a simpler method of amendment. During the 63d Congress, which, however, lies beyond the period under consideration, no less than ten such proposals were made.<sup>10</sup>

Considering the fact that during the first century of the history of the Constitution only three proposals were made to change the method of amending the Constitution,<sup>11</sup> this later phase in the development of the movement for popular government bids fair to produce results of far-reaching importance.

<sup>10</sup> 63d Cong., 1st Sess. S. J. R. 9, 20, 24, 26; H. J. R. 60, 95. 63d Cong., 2d Sess. H. J. R. 220, 221, 319. 63d Cong. 3d Sess. H. J. R. 422. S. J. R., 26 was reported adversely from the Committee Judiciary. Feb. 5, 1914, Mr. Cummins of Iowa submitted the report of the minority in which, with the exception of several points, Ashurst of Ariz., Walsh of Wash., Borah of Idaho, Nelson of Minn., and Overman of N. C. concurred. See S. Report 147.

<sup>11</sup> See Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of its History*, pp. 292–293.